* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: April 7, 2007.
Date of Decision : April 18, 2007.

\+ W.P.(C) 10287/2005 & CM No 7565/2005

SMT. JAGDISH NARAYAN ..... Petitioner
Through Ms. Meenakshi Arora with Ms. Mala Narayan and Mr. Laliet Kumar, Advocates

versus

NORTH DELHI POWER LIMITED & ANR. ..... Respondents
Through Mr. Amit Kapur with Mr. Mansoor Ali, Mr. K.Dutta and Ms. Sakie Jakharia, Advocates

\+ W.P.(C) 10291/2005 & CM No 7572/2005

SHRI ASHOK NARAYAN ..... Petitioner
Through Ms. Meenakshi Arora with Ms. Mala Narayan and Mr. Laliet Kumar, Advocates

versus

NORTH DELHI POWER LIMITED & ANR. ..... Respondents
Through Mr. Amit Kapur with Mr. Mansoor Ali, Mr. K.Dutta and Ms. Sakie Jakharia, Advocates

AND

\+ W.P.(C) 10298/2005 & CM No 7582/2005

SMT. PRAKASH NARAYAN ..... Petitioner
Through Ms. Meenakshi Arora with Ms. Mala Narayan and Mr. Laliet Kumar, Advocates

versus

NORTH DELHI POWER LIMITED & ANR. ..... Respondents
Through Mr. Amit Kapur with Mr. Mansoor Ali, Mr. K.Dutta and Ms. Sakie Jakharia, Advocates

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT

:Dr. S.Muralidhar, J.

1. These three writ petitions raise common questions challenging Speaking Orders passed by the Respondent determining that each of the Petitioners is guilty of dishonest abstraction of energy (DAE). The petitions challenge the bills raised by the respondent on the basis of such determination.

Background Facts

2. The three petitioners reside in the same building at 7, Raj Narain Road, Civil Lines, Delhi – 110 054 on different floors. Each has a different electricity connection. Smt. Jagdish Narayan, the petitioner in WP(C) 10287 of 2005 is a 71 year old lady, living in Apartment No. A-4 and having an electricity connection K.No. 31200137585. Smt. Prakash Narayan, the petitioner in WP(C) 10298 of 2005 is a 86 year old lady, living in Apartment No. A-7 and having an electricity connection K.No. 31200137584. Shri Ashok Narayan, the petitioner in WP(C) 10291 of 2005 is 53 years old, residing in Apartment No. A-3 in the same building and having an electricity connection K.No. 31200137582. The petitioners obtained a domestic 11KW electricity connection from the erstwhile Delhi Vidyut Board (DVB) which has been succeeded by the respondent North Delhi Power Ltd. (NDPL).

3. The petitions narrate the following facts. Smt. Jagdish Narayan and Smt. Prakash Narayan are widows of the respective co-owners of 7, Raj Narain Road, Civil Lines which is an ancestral property of the

family. Shri Ashok Narayan is also a co-owner. The property was reconstructed into several flats some time in 1990-91 and that is how each of these petitioners came to occupy a separate flat. Smt. Jagdish Narayan, whose husband expired in the 1995 has four children: three sons and one daughter. All the four children are married and settled abroad for the last several years and have never resided in the flat in question. She has been visiting them abroad for about four to five months in a year. During her absence, her flat lies locked and there is hardly any consumption of electricity. She resides in one bed room on the ground floor although the children have fitted all the rooms with modern electronic gadgets.

4. Smt. Prakash Narayan, has two children (one son and one daughter). Both children are married. Her daughter is settled in Lucknow for the last more than 20 years and has never resided in the flat in question. Her son is bed-ridden for the last four years and has restricted movements. Her son has two children, one daughter and one son. His daughter has been settled in USA and his son is pursuing Management Studies and is hardly at home. In summer months she uses a desert cooler on the ground floor of her flat. She and her son, who is bed-ridden, do not require an air-conditioner.

5. Shri Ashok Narayan states that one of his sons is studying abroad. As such, the family comprising his wife, his daughter and himself occupy the said flat. None of them is at home during the day on account of their respective occupations.

6. It is stated by Shri Ashok Narayan that in the month of May 2002 he noticed that the glass of the electricity meter had fallen from

its position and had broken due to long usage of gluing material leading to weakening of the sealing compound holding the glass. Consequently on 27.5.2002 he wrote out a complaint to DVB which was duly received by in the local office the DVB on the same date. In the month of November 2004 after the Respondent No.1 announced a Voluntary Disclosure Scheme he sent them a reminder on 29.11.2004 about his faulty meter.

7. Each of the petitioners state that on 20.4.2005 some officials of the respondent NDPL came to the premises of the petitioners. Stating that they had come to change the meters they sought to check the connected load in the premises. The petitioners allowed the officials of the NDPL to check the connected load. The petitioners were informed that the new meters would be installed within ten days. Thereafter on 21.4.2005 the NDPL officials once again visited the premises for checking the place for installation of the new meters. At this point, the Respondent No.1 officials informed each of the petitioners (in the case of Shri Ashok Narayan, his wife was present in the premises) about some 'RR' that had been signed and pasted on the meters. The petitioners claim to have been surprised at this development since none of them had handled the electronic meters at all. They were not aware of any particular monogram seal on the meter. Thereafter each of the petitioners received a show cause notice dated 21/23.4.2005 along with a copy of the Inspection Report. The Inspection report contained an endorsement to the effect that the petitioners had allegedly refused to sign the inspection report. However, each of the petitioners claim that no such inspection report was given to them.

8. In the inspection report, it was stated that the inspection team found the following defects as regards the meters of Smt. Jagdish Narayan and Smt.Prakash Narayan:

(i) All half seals on meter were found fictitious as they did not tally with the authenticated sample monogram.

(ii) Both rivets of the meter were found tampered.

(iii) Against the sanctioned load of 11 KW, the total connected load was found to be 2022.313 KW for Smt.Jagdish Narayan and 24.053 KW for Smt.Prakash Narayan and after working out the formula, the billing load was found to be 14.813 KW and 15. 053 KW respectively.

(iv) The meter disc was moving in right direction on two phases. One phase o/g (out going) was not found coming on the 3 KW load.

(v) The meter was installed in private meter box on a wooden board.

9. As regards Shri Ashok Narayan the defects at (i), (ii) and (v) above were repeated. It was observed that meter disc was found stopped on all the three phases on 3 KW external board. Further "Meter window glass also found broken deliberately through which disc/dial are accessible to manipulate the recorded consumption." The connected load was 20.590 KW and the billing load was 14.590 KW.

10. Show cause notices were issued to which each of the petitioners replied on 30.4.2005 denying the allegations that they ever refused to sign the inspection report and accept the show cause notice along

with a copy of the inspection report and that therefore the NDPL had been compelled to paste on the lower space. As regards the notice for DAE, each of the petitioners claimed ignorance of those averments and referred to the representation made by them to the NDPL for installation of new meter at an early date. As regards the inspection report, Smt. Jagdish Narayan in her reply stated:

> "You have mentioned 'Both rivets of meter found tampered, seals not existing and half-seals on meter found fictitious as they do not tally with authorized seal and sample monogram.' These were never shown to me at the time of inspection. In any case I cannot comment on this remark because I have no idea of what the original seals looked like. All that I can say is that the meter in question has never been removed from its place in my presence and I am in no way responsible for the faults reported by you and cannot hold myself liable for these."

11. Speaking Orders dated 12.5.2005, 12.5.2005 and 16.5.2005 were passed concluding that a case of Dishonest Abstraction of Energy ('DAE') with excess load was made out in each of the three cases. The speaking orders reiterated that since the petitioners had refused to accept the inspection report, the same was pasted on the meter. It was then observed as under:

> "Plaintiff's metering equipment was found tampered and it is presumed unless contrary is proved that such tampering existed for the benefit of the plaintiff. Due to the findings of the Inspecting team only the show cause notice was issued and a case of Dishonest Abstraction of Energy is initiated against the plaintiff. The inspecting team has recorded those findings which in fact existed at the site of inspection and that included unauthorized installation of meter on private wooden board. Moving of meter disc in right direction was making it clear that the consumer has cleverly slowed down the recording of consumption after tampering the meter and not stopped it at all. As regards your contention that the tampering was never highlighted, it is clarified that the meter

> readers visit the premises solely with the purpose of noting down the reading of meter and the tampering was detected when the abovesaid inspection was carried out by a team of technical persons."

The speaking orders stated that the recorded consumption was lesser than the tolerable limit as compared with the computed consumption and therefore, the case of DAE stood "amply" corroborated by the consumption pattern.

12. Applying the formula for DAE cases, bills in the sums of Rs.1,59,703/-, Rs.1,59,949/- and Rs.1,55,101/- were raised against Smt. Jagdish Narayan, Smt. Prakash Narayan and Shri Ashok Narayan respectively. Thereafter, these writ petitions were filed challenging the Speaking Orders and the bills.

13. While directing notice to issue in these writ petitions, this Court by an order dated 10.6.2005 granted a stay of the disconnection of the electricity supply to the petitioners subject to the petitioners depositing a sum of Rs.50,000 each within eight weeks from the said date of order. The petitioners were to continue to pay current demand charges.

Submissions of Counsel

14. Appearing for the petitioners, Ms. Meenakshi Arora, learned counsel submitted that the respective speaking orders were manifestations of arbitrary exercise of powers since they were based on surmises and conjectures. She submitted that each of the petitioners had been regularly paying all the electricity bills raised till the impugned bills came to be issued and the past consumption pattern showed no abnormality. Adverting to the facts of the requirement under Regulation 25(iii) of the DERC Regulations, she

submitted that in the absence of conclusive proof as mandated by that regulation, the respondent could not conclude that it was a case of DAE. She further submitted that none of the other points made by the petitioners in their respective replies to the show cause notice had been dealt with by the respondent in the impugned Speaking Orders. She also pointed out there was no corroborating evidence in the form of photographs taken at the time of inspection and therefore it was not possible to verify the respondent's version of what transpired at the time of inspection. The respondent, according to her, failed to establish that each of the petitioners had anything to do with the alleged tampering of the meter and therefore the impugned bills were illegally raised.

15. Supplementing the submissions of Ms.Arora, Mr. Laliet Kumar, learned counsel referred to the detailed procedure outlined in Regulations 25 and 26 of the DERC Regulations which require the designated authority to authorize an officer for undertaking the search of the premises in question. He submitted that there was no such designated authority at the time of the inspection in these cases. He referred to the notification dated 31.3.2004 designating the Manger of the Respondent No.1 as the authorized Officer for the purposes of undertaking searches in terms of Section 135 (2) of the Electricity Act, 2005 ('Act') and submitted that inspection report shows that the Manager was not a part of the team and therefore, the search of the premises was unauthorized. Referring to the requirement of Regulation 25 (vi) that "a numbered Johnson's paper seal" had to be affixed on the tampered meter, Mr. Kumar submitted that what was pasted on the meter was an 'IR' meaning the inspection report. Accordingly, there was a breach of this condition as well. He

further submitted that merely because the half seal was found fictitious or the fact that the rivets were found tampered did not mean that the metering arrangement was accessible for the purposes of tampering.

16. Relying on the judgment of the Hon'ble Supreme Court in ***P.R. Metrani v. Commissioner of Income Tax, Bangalore*** (2007) 1 SCC 789, Mr.Kumar submitted that the words “conclusive evidence” occurring in Regulation 25 (iii) had to be interpreted as requiring proof to be determined by conclusive means and not by a deeming provision by way legislative fiction. Referring to Regulation 25 (vii), Mr. Kumar submitted that the requirement of handing over a copy of the inspection report to the consumer failing which having it pasted on the premises had not been adhered to in the instance case. Finally, adverting to the consumption pattern under Regulation 26 (ii), Mr. Kumar submitted that the formula for determining penalty in the event of theft cannot be applied unless there is in fact a discovery of theft. In other words, the penalty formula cannot be first applied to conclude that there was a case of theft or DAE.

17. In reply Mr. Amit Kapur submitted that the obligation to maintain the meter was on the consumer. Where the meter was found tampered, the burden shifted on the consumer to show that the consumer had not tampered the meter. He pointed out that the fact that rivets were tampered; that there was no supply of out going current in the three KW load in one phase and that all the half seals of the meter was found fictitious constituted sufficient evidence to draw the presumption of DAE in terms of Section 135 (2) of the Electricity Act 2003 (‘Act’). He pointed out that the computed consumption was

several times higher than the recorded consumption leading to an unmistakable inference of DAE. He placed reliance upon the judgment of this Court in ***Sohan Lal v. North Delhi Power Limited*** 113 (2004) DLT 547 to contend that demanding a DAE penalty five times the normal tariff was justified. He relied on the judgment of the Hon'ble Supreme Court in ***J.M.D.Alloys Limited v. Bihar State Electricity Board*** (2003) 5 SCC 226 to contend that even in that case the seal was found broken but the inference of DAE was upheld by the court. It was held that acquittal in the criminal case had nothing to do with the independent conclusion by the supplier of electricity and that the scope of interference by High Court under Article 226 of the Constitution was extremely limited in such cases. He sought to explain the impugned bill as a recovery of the compensatory charge which was an independent remedy available to the supplier of electricity. He submitted that the issues raised by the petitioners were beyond the scope of the pleadings. Since there was no challenge to the Regulations, the petitioners could not question the applicability of the LDHF formula for determining the billing load for the purposes of levying penalty.

Statutory Provisions

18. Since the respondents are seeking to make out a case of DAE, the provisions of the Act, the Rules and the Regulations require to be first noticed. At the very outset it must be noticed that under the Act there is no definition of Dishonest Abstraction of Energy. That is defined only in the Regulations. The concept is nevertheless traceable to Section 135 of the Act which reads as under:

> "Section 135 Theft of electricity – (1) Whoever, dishonestly, - (a) taps, makes or causes to be made any connection with overhead, underground or under water lines

or cables, or service wires, or service facilities of a licensee; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity,

so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both;

Provided that in a case where the load abstracted, consumed or used or attempted abstraction or attempted consumption or attempted use -

(i) does not exceed 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity.

(ii) exceeds 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six months but which may extend to five years and with fine not less than six times the financial gain on account of such theft of electricity:

Provided further that if it is proved that any artificial means or means not authorized by the Board or licensee exist for the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer."

19. The procedure for conducted search and seizure operations is set out under Sections 135 (2), (3) and (4) which read as under:

> " (2). Any officer authorized in this behalf by the State Government may -
>
> (a) either, inspect, break open and search any place or premises in which he has reason to believe that electricity [has been or is being] used unauthorizedly;
>
> (b) search, seize and remove all such devices, instruments, wires and any other facilitator or article which used for unauthorized use of electricity;
>
> (c) examine or seize any books of account or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under sub-section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts therefrom in his presence.
>
> (3) The occupant of the place of search or any person on his behalf shall remain present during the search and a list of all things seized in the course of such search shall be prepared and delivered to such occupant or person who shall sign the list:
>
> Provided that no inspection, search and seizure of any domestic places or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.
>
> (4) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure shall apply, as far as may be, to searches and seizure under this Act."

20. Regulation 2 (i) and 2 (m) of the Regulations define "direct theft" and "dishonest abstraction of energy" respectively as under::

> "2(i) 'Direct theft' shall mean abstraction of electrical energy either through by passing the meter by some arrangement external to it or through unauthorized tapping of the supply from licensee's distribution network."

2(m) 'Dishonest Abstraction of Energy (DAE)' shall mean abstraction of electrical energy where accessibility to the internal mechanism of the metering equipment and some collateral evidence is found to support the conclusion that the meter has been caused to record less energy than actually passing through it. It shall also include any other means adopted by consumer to cause the meter to stop or run slow (such as reversing the polarity of one phase of poly phase meters, changes in CT or PT, etc.)."

The other relevant Regulations are 25 and 26 which read thus:

"**25 Procedure for booking a case of pilferage of energy**

(i) The licensee, *suo moto* or on receipt of reliable information regarding commitment of any offence of theft/tampering/ dishonest abstraction of energy (DAE), shall promptly conduct inspection of consumer's premises. The inspection team shall carry a written authority signed by designated officer of the licensee.

(ii) The inspecting team shall prepare a report giving details such as connected load, condition of seals, working of meter and mention any irregularity noticed (such as artificial means adopted for dishonest abstraction of energy) as per format prescribed by the licensee.

(iii) The report shall clearly indicate whether conclusive evidence substantiating the fact that energy was being dishonestly abstracted was found or not. the details of such evidence should be recorded in the report and it should be clearly brought out whether the case is being booked for direct theft or DAE.

(iv) No case for DAE shall be booked only on account of one seal on the meter missing or tampered or breakage of glass window, etc., unless corroborated by consumption pattern of consumer as per regulation 26(ii) given below and such other evidence as may be available.

(v) In case sufficient evidence is found to establish direct theft of energy, the licensee may lodge a report with the local police along with the material evidence including

wires/cables, meter, service line etc., seized from the site, which shall be handed over to police. The licensee shall also assess the energy consumption for past six months as per the Tariff Order and prepare final assessment bill on five times the rates as per applicable tariff. The consumer shall be required to make the payment within two working days of its proper receipt.

(vi) In case of suspected DAE, the inspection team shall not remove the tampered meter but shall disconnect it from the supply and shall restore the supply through a new meter of appropriate rating. In such cases, the licensee shall check the connected load and consumer's installation, affix a numbered Johnson's paper seal on the tampered meter and shall also record the particulars of the same in the report.

(vii) While the report must be signed by each member of the joint team and the notice, if any, must be signed by an authorized signatory of the licensee and all these must be handed over to the consumer or his/her representative at site immediately under proper receipt. In case of refusal by the consumer or his/her representative to either accept or give a receipt, a copy of each must be pasted at a conspicuous place in/outside the premises. Simultaneously, the joint report, the assessment bill and the notice shall be sent to the consumer under Registered Post.

(viii) The consumer shall be served a 3 day's show cause notice at the site as to why the case of DAE should not be booked against him/her. The notice should clearly state the time, date and place at which the reply has to be submitted and the designation of the person to whom it should be addressed.

26 **Personal hearing**

(i) Within 4 working days from the date of submission of consumer's reply, if made within prescribed period, the licensee shall arrange a personal hearing with the consumer.

(ii) Before the personal hearing, the officer of the licensee, before whom personal hearing has to be given, shall analyse the case after carefully considering all the documents, submissions by the consumer, facts on record and the consumption pattern, wherever

available. The licensee shall also assess the energy consumption for past six months as per the Tariff Order. In case of suspected DAE, if consumption pattern for last one year is reasonably uniform and is not less than 75% of the assessed consumption where meter is less than 10 years old and not less than 65% of the assessed consumption where meter is more than 10 years old, no further proceedings shall be taken and the decision shall be communicated to the consumer under proper receipt within 3 working days and connection shall be restored through original meter.

(iii) During the personal hearing the licensee shall give due consideration to the facts submitted by the consumer and pass, within 15 days, a speaking order as to whether the case of suspected theft/DAE is established or not. In case of the decision that the case of suspected theft/DAE is not established, no further proceedings shall be taken and connection shall be restored through original meter.

(iv) Where it is established that there is a case of DAE, the licensee [may] lodge a report with the local police along with the material evidence including wires/cables, meter, service line, etc. seized from the site, which shall be handed over to police. The licensee shall also assess the energy consumption for past six months as per the Tariff Order and prepare final assessment bill on 5 times the rates as per applicable tariff. The consumer shall be required to make the payment within 2 working days of its proper receipt. The licensee may, taking into consideration the financial position and other conditions of the consumer, extend the last date of payment or approve the payment to be made in instalments. The amount, the extended last date and/or time schedule of payment/installments should be clearly stated in the speaking order. A copy of the speaking order shall be handed over to the consumer under proper receipt on the same day."

21. In order to draw a presumption of DAE against a consumer in terms of the second proviso to Section 135 (1), it must first be shown by the supplier or licensee that "any artificial means or means not authorized by the Board or licensee exist for the abstraction,

consumption or use of electricity by the consumer……." Till such time this initial burden is not discharged by the supplier of electricity, the burden of proof under the second proviso to Section 135 (1) of the Act does not shift to the consumer.

22. Mr. Kapur referred to Section 135 (1)(b) and submitted that "whoever dishonestly tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration ……." would be guilty of theft of electricity and therefore DAE and that the punishment prescribed under that provision would stand attracted. In other words, he submitted the Section 135 itself covered both theft and DAE. This Court is not inclined to approach the question of interpretation of the regulation in the manner suggested by the learned counsel for the respondent. It is correct that the term DAE is defined only in the Regulation. Surely the Regulations cannot travel beyond the Act and seek to define a new type of infraction not envisaged by the Act itself. Conscious of this difficulty, Mr. Kapur sought to trace the species of DAE to Section 135 itself. This perhaps is the better approach but then the contours of DAE would get circumscribed by the rigours of Section 135 itself. The regulations can only explicate what the Act provides. Thus the regulations define direct theft to require the existence of tangible evidence of actual theft of electricity. Even the definition of DAE requires the presence of physical evidence which would go to reveal the use of any devices for slowing down the meter or interfering with the movement of the meter to the unlawful advantage of the consumer.

23. What is central to the definition of theft under Section 135 of the Act, which according to the respondent covers DAE as well is the element of 'dishonesty'. Therefore the *mens rea* or the intention of the consumer to dishonestly abstract electricity must be proved "conclusively" to bring home the charge of DAE. Therefore the requirement of "conclusive evidence" in terms of Regulation 25 (iii) is consistent with the statutory mandate of Section 135 (1). That can be established only by showing that the consumer was responsible for tampering the meter by some visible means. The external manifestations of tampering, as has been found in the inspections conducted in the present cases, can only raise a suspicion of DAE. That suspicion will have to be made good by some tangible evidence of physical means of tampering before the presumption can be drawn that it was the consumer who tampered the meter.

24. The decision of the Hon'ble Supreme Court in ***Jagannath Singh v. B.S. Ramaswamy*** [1966] 1 SCR 885 is illustrative although there the Court was concerned with a criminal conviction for the offence of theft of electricity under Sections 39 and 44 of the Indian Electricity Act, 1910. The approach to the requirement of proof of dishonest abstraction of energy is nevertheless relevant for the present case. The Hon'ble Supreme Court held that the existence of artificial means for abstracting energy can only give rise to a presumption that there had been a dishonest abstraction. The supplier would still have to show that the consumer is responsible for such tampering. In the said case, it was contended that the existence of an open stud hole on the meter was sufficient proof that dishonest abstraction of energy had taken place. In answer to that contention, the Hon'ble Supreme Court observed as under:

> "A meter with an exposed stud hole, without more, is not a perfected instrument for unauthorized taking of energy, and cannot be regarded as an artificial means of its abstraction. To make it such an artificial means, the tampering must go further, and the meter must be converted into an instrument for recording less than the units actually passing through it. A check meter affords an easy method of proving that the consumer's meter is recording less than the units consumed and is being used as an artificial means for abstraction of the unrecorded energy. To bring home the charge under Section 39, the prosecution must also prove that the consumer is responsible for the tampering. The evidence adduced by the prosecution must establish beyond doubt that the consumer is guilty of dishonest abstraction of energy."

25. Applying the above test, it has to be held that an automatic presumption of DAE on the basis of the external symptoms of tampering together with the analysis of the consumption pattern would not be a safe and error free method. Some other tangible evidence must been shown to exist. An accu check meter can be deployed to find out if the meter is in fact recording lesser units. The analysis of the consumption pattern in terms of the Regulation 26 (ii) is merely corroborative and not by itself substantive evidence of DAE. The decision of this Court in ***Udham Singh v. BSES Rajdhani Power Ltd***. 136 (2007) DLT 500 is to the same effect. In fact, the formula is applied in terms of Regulation 25 (iv) read with 26 (ii) only for determining the penalty payable by the consumer once a case of either direct theft or DAE has been made out. The penalty formula cannot itself supply the proof of DAE or theft.

26. The decision in ***Sohan Lal*** (supra) is not helpful in the instant case to determine if a case of DAE has been made out. In ***Sohan Lal*** the Court was concerned about the formula that was applicable once

the case of theft or the DAE had been established. However, in the instant case, unless and until the Respondent No.1 is able to show from the record that there exists "conclusive evidence" that a case of DAE is made out against each of the petitioners, the question of applicability of formula whether it is LDHF or any other formula simply does not arise. Likewise, the decisions of this Court in ***Archana Mathur v. BSES Rajdhani Power Ltd***. 123 (2005) DLT 500, ***Jai Dev Sharma v. BRPL*** [WP(C) 12317/2005] and ***Bhai Investment v. MCD*** 137 (2007) DLT 91 appear to have turned on the facts of those cases and are distinguishable in their application to the cases on hand.

No case of DAE made out in the instant cases

27. Turning to the cases on hand, it will be recalled there is no indication from the inspection reports that any device or "film" or a "shunt" was used to slow down the meter. No accu check apparatus was used to determine if the meter was in fact recording lesser energy than it should. No photographs of the condition of the meter at the time of inspection have been shown although that by itself could not constitute proof. It is clear from a reading of the Speaking Order that the inference of DAE has been drawn only on the basis of the penalty formula in terms of Regulation 25 (iv) read with regulation 26 (ii). Starting with the presumption of DAE, the respondent has proceeded to determine the "assessed units" or "computed consumption" by applying the LDHF formula to the billing load which in turn is a percentage of the connected load. The units so determined are then compared with the "recorded units" and if the latter is less than the permissible limit in terms of Regulation 26 (ii) an inference of DAE is drawn. What is missed in this laboured reasoning by the

respondent is that the fundamental premise of this exercise is that DAE already stands established, when in fact it was not. The respondent failed to appreciate that the LDHF formula is applied only to determine if the penalty has to be five times the normal tariff or not. The fact that the formula is applied cannot constitute "conclusive evidence" of DAE.

28. Even in Shri Ashok Narayan's case where it was said that the glass of the meter was found "deliberately" broken, it must be remembered that in May 2002 itself he had given a complaint to the erstwhile DVB that he had himself found the meter glass broken. In the speaking order, the NDPL doubted the genuineness of the complaint saying that it did not bear any stamp or diary number. However, the photocopy of the said complaint annexed to the petition does indicate that it has been signed by a person in the office of the erstwhile DVB. The document can hardly be said to be not genuine. Further, it is claimed in the case of Shri Ashok Narayan that the "meter disc was stopped in all three phases." This renders it incredible that till the month previous to the inspection the meter reading was being taken by the meter reader and bills raised and paid. How is it possible that in case the meter disc had stopped on all phases, it was not noticed and how was the meter recording units of consumption on the basis of which bills were being raised? The explanation that "the meter reader visited the premises with the purpose of entering the meter reading" cannot hold water in this case where it is alleged that there were visible signs of tampering and the meter disc was alleged to have stopped on all phases.

29. There is another aspect that requires to be noticed. In their

replies to the show cause notices, each of the petitioners had denied the charged that they refused to accept the inspection report. They also adverted to the fact that the inspection team visited the premises stating that the meters were required to be changed. The speaking order however does not advert to this explanation at all. The explanation offered by the petitioners appears natural. If indeed they were told that the meters were to be changed, they were hardly going to suspect that they would be slapped with charges of theft of electricity. Moreover they would have insisted on some basic procedural safeguards before permitting inspection of the meters.

30. The speaking orders show that even though the respondent was compelled to admit that the meter disc was found moving in the right direction, this was explained away by surmising that the consumer had "cleverly" slowed it down. In fact there is nothing to show that the consumer had slowed down the meter. The only way of deciding the issue would have been to use an accu check equipment which in fact has not been done in these cases.

31. The decision of the Hon'ble Supreme Court in ***J.M. D. Alloys Limited*** (supra) was rendered in the context of an industrial consumer whose electricity meter was possibly installed on the premises. The access to such meter by the consumer is certainly not the same as present case involving elderly persons living alone in a residential flat where meters are located on the ground floor outside their flats. The decision in ***J.M.D Alloys*** was rendered in a different set of facts and cannot be applied to the facts on hand.

32. While on the aspect of external evidence of "tampering" in the

form of broken seals or tampered seals, this Court would like to observe that an inference of DAE should not be permitted to be drawn on the mere fact that a meter had been found with broken seals. It would be impermissible for the respondent to treat all categories of consumers on the same footing when it proceeds to take action on a suspicion of DAE. Right now there is no secure measure to ensure that the electricity meters installed either in the basement of the building or on the ground floor near the stair case, are tamper-proof and outside the reach of any mischievous third party. It is one thing to require the consumer to ensure that the meter is safe and secure. It is perhaps also necessary to ask if the supplier of electricity draws the attention of the consumer to such responsibility and insists that the consumer secures the meter with a lock with one duplicate key being handed over to the supplier. In an environment where it is not possible for a domestic consumer living in an apartment where the meter is installed in the basement or ground floor to constantly keep a watch on his meter, it would not be reasonable to draw inference of DAE merely on the discovery of some signs of 'tampering'. Regulation 25 (iv) only goes a part of the way but does not fully appreciate the predicament of the consumer in such situations. Hopefully, the DERC and the supplier companies will work at improving the requirements for the consumers in this direction.

33. For the above reasons, it is held that in these cases, no inference of DAE by the petitioners could possibly have been drawn by the respondent on the basis of the materials that exist on record. The impugned speaking orders and the bills raised on that basis are not sustainable in law.

34. In view of the finding that no case of DAE is made out, this Court does not find it necessary to examine the submission of the petitioners that there have been violations of procedure in the matter of conducting the inspection in the present case.

The argument of unintended consequences

35. Finally, Mr. Amit Kapur made an earnest plea that this Court should desist from interfering in these cases since the unrecovered amounts in cases such as these would actually increase the burden not only on the respondent company but on the other consumers as well. The argument went like this. If the Court were to hold that the bills raised in these cases are not recoverable then the amount covered by these bills would go to add to the transmission and distribution losses of the respondent company. In order to meet the targets set by the DERC, the only way that the respondent company can recoup these losses is to increase the tariff. Thus, as a result of these bills not being recovered, the consumers as a class would have to pay higher tariffs and this was certainly not in their interest.

36. The above argument has only to be stated to be rejected. It is no explanation to a consumer against whom theft or DAE bills have wrongly been raised to insist that he pay the bills so that other consumers do not have to suffer on account of the consequential higher tariff. This argument is in fact strange since it insists that the supplier who raised the illegal bills should not suffer the consequences of such arbitrary action but should be permitted to pass the burden again to the consumers. This certainly was not an anticipated outcome of the decision to privatize the distribution and supply of electricity in Delhi. It was also not an unstated premise of the agreement with the private companies that they would be free to

raise illegal demands on consumers without having to suffer the legal consequences.

37. For the above reasons, the impugned speaking orders are set aside and the impugned bills are quashed. The respondent will now rework the bills to collect the normal charges for the actual recorded consumption as per the meter reading (without levying interest) and adjust against the demand so calculated the sum of Rs. 50,000 paid by each of the petitioners to the respondent pursuant to the interim orders of this Court. The balance amount after such adjustment will be refunded to each of the petitioners by the respondent along with interest at the rate of 12% from the date of their payment by the petitioners till the date of refund by the respondent. The refund should be made within a period of three months from today and in any event not later than 20.7.2007. Any delay beyond the said period, would attract higher interest at the rate of 18% per annum. The respondent will also pay to each of the petitioners a sum of Rs.10,000 as costs within a period of four weeks from today and in any event not later than 20.5.2007.

38. With the above directions, these writ petitions are allowed and all the pending applications are disposed of.

Sd/-
S. MURALIDHAR,
J.
April 18, 2007
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